

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
HOWARD A. OLDS, INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB No. 79-192

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of civil penalties totalling \$750 for outdoor burning allegedly in violation of Sections 9.04 and 9.11(a) of respondent's Regulation I, having come on regularly for formal hearing on the 7th day of May, 1980 in Seattle, Washington, and appellant Howard A. Olds, Inc., appearing through its attorney Thomas G. Rakus, and respondent Puget Sound Air Pollution Control Agency, appearing through its attorney Megan Foley, with William A. Harrison, hearing officer presiding, and the Board having considered the exhibits, testimony, records and files herein, and having reviewed the Proposed

1 Order of the presiding officer mailed to the parties on the 22nd day  
2 of April, 1980, and more than twenty days having elapsed from said  
3 service; and

4 The Board having received exceptions to said Proposed Order and  
5 having considered and denied said exceptions and the Board being fully  
6 advised in the premises; NOW THEREFORE,

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed  
8 Order containing Findings of Fact, Conclusions of Law and Order dated  
9 the 22nd day of April, 1980, and incorporated by reference herein and  
10 attached hereto as Exhibit A, are adopted and hereby entered as the  
11 Board's Final Findings of Fact, Conclusions of Law and Order herein.

12 DATED this 17<sup>th</sup> day of June, 1980.

13 POLLUTION CONTROL HEARINGS BOARD

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15 Nat W. Washington  
16 NAT W. WASHINGTON, Chairman

17 David Akana  
18 DAVID AKANA, Member

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27 FINAL FINDINGS OF FACT,  
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PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of civil penalties totaling \$750 for outdoor burning allegedly in violation of Sections 9.04 and 9.11(a) of Regulation I, came on for hearing before the Pollution Control Hearings Board, Chris Smith, Member, convened at Seattle, Washington on March 7, 1980. Hearing Examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, Thomas G. Rakus. Respondent

EXHIBIT A

1 appeared by its attorney, Megan Foley.

2 Witnesses were sworn and testified. Exhibits were examined. From  
3 testimony heard and exhibits examined, the Pollution Control Hearings  
4 Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260, has filed with this Board  
8 a certified copy of its Regulation I containing respondent's  
9 regulations and amendments thereto of which official notice is taken.

10 II

11 Appellant, Howard A. Olds, is the developer of the subject land  
12 located in Snohomish County. The clearing of natural vegetation and  
13 its disposal was under appellant's control at all times pertinent to  
14 the appeal. On July 9, 1979, appellant applied to respondent Puget  
15 Sound Air Pollution Control Agency (PSAPCA) for verification of  
16 population density in order to dispose of cleared vegetation of  
17 burning. PSAPCA verified that area population density would allow  
18 such burning but required appellant to certify that any burning would  
19 be conducted in accordance with PSAPCA's Section 9.04 and 9.11(a)  
20 which are at issue here.

21 Appellant directed that the land, approximately 7 acres and 300' x  
22 1100 feet, be cleared of vegetation, and that the vegetation be burned  
23 in a single pile some 200 feet from the nearest of 20 residences  
24 located to the southeast of the fire site. This was done.

25 III

26 On August 20, 1979, the fire, consisting of a large quantity of  
27

1 natural vegetation, emitted flyash and soot which settled onto the  
2 home and lot of a residence about 650 feet from the fire and among the  
3 20 residences to the southeast. Wind from the north-northwest, at  
4 normal velocity, carried flyash and soot onto the home and lot in such  
5 quantity that it marked the paint on an automobile and boat kept on  
6 the lot. In the 80 degree weather then prevailing, the smoke of the  
7 fire caused the home's occupants to suffer respiratory distress,  
8 watering eyes and nausea from odor over the course of the full day  
9 during which these effects continued. The occupants were unable to  
10 open the windows of their home because of the smoke and flyash. They  
11 consulted a physician concerning a means to combat sinus and breathing  
12 discomfort. The smoke and flyash were such as to prompt the occupants  
13 to file a written complaint with respondent, whose inspector came to  
14 their residence on the day in question. After verifying the effects  
15 of the fire complained of, the inspector issued a Notice of Violation  
16 against appellant and served it upon appellant's workman present at  
17 the fire site. Appellant later received a Notice of Civil Penalty  
18 (No. 4420) citing violation of Sections 9.04 and 9.11(a) of  
19 respondent's Regulation I and assessing a civil penalty of \$250.

#### 20 IV

21 On each of September 10 and 13, 1979, the same fire emitted flyash  
22 and smoke onto the home and lot of a residence about 300 feet from the  
23 fire and also among the 20 residences to the southeast. Flyash from  
24 the fire was visible on the lawn of the residence. The occupant's  
25 throat was "burning" from the smoke of the fire and confined the  
6 occupant to the house, the windows of which had to be closed to block  
27

1 the smoke in the 80 degree weather. On each day the smoke and flyash  
2 prompted the occupant to file a written complaint with respondent.  
3 Upon visiting the site on each of the two days, respondent's inspector  
4 observed conditions verifying the existence of the effects complained  
5 of. On each day, the inspector again issued a Notice of Violation  
6 against appellant and served it upon appellant's workman present at  
7 the fire. Appellant later received a Notice of Civil Penalty for each  
8 of September 10 and 13, 1979, (Nos. 4452, 4444 and 4454), each citing  
9 violation of Section 9.11(a) of respondent's Regulation I and each  
10 assessing a civil penalty of \$250.

11 From these and the earlier civil penalty for August 20, 1979,  
12 appellant appeals.

13 v

14 Any Conclusion of Law which should be deemed a Finding of Fact is  
15 hereby adopted as such.

16 From these Findings the Board comes to these

17 CONCLUSIONS OF LAW

18 I

19 Respondent's Section 9.04 of Regulation I provides:

20 It shall be unlawful for any person to cause  
21 or allow the discharge of particulate matter  
22 which becomes deposited upon the real property  
23 of others except as follows:

24 (1) When such emissions are proved by such  
25 person to be in compliance with Section 9.09.

26 (2) Temporarily due to breakdown of  
27 equipment, provided that repairs are promptly  
made.

(3) During the time for compliance with  
this Regulation fixed by the Control Officer  
or the Board.

1 "particulate matter" means any material, except water in an  
2 uncombined form, that is or has been airborne and exists as a liquid  
3 or a solid at standard conditions. Section 1.07(w) of Regulation I.  
4 Appellant's flyash and soot is thus particulate matter in this case.  
5 It was discharged from appellant's landclearing fire and became  
6 deposited upon the real property of another, a nearby resident, on  
7 August 20, 1979. We conclude that appellant therefore violated  
8 respondent's Section 9.04 of Regulation I on that date.

9 II

10 Respondent's Section 9.11(a) of Regulation I provides:

11 (a) It shall be unlawful for any person to  
12 cause or permit the emission of an air  
13 contaminant or water vapor, including an air  
14 contaminant whose emission is not otherwise  
15 prohibited by this Regulation, if the air  
16 contaminant or water vapor causes detriment to  
17 the health, safety or welfare of any person,  
18 or causes damage to property or business.

19 "Air contaminant" is defined to include smoke, flyash and odor.  
20 Section 1.07(b) of Regulation. "Emission" is a release into the  
21 outdoor atmosphere of an air contaminant. Section 1.07(j); RCW  
22 70.94.030(8). Air pollution is defined as:

23 . . . presence in the outdoor atmosphere of  
24 one or more air contaminants in sufficient  
25 quantities and of such characteristics and  
26 duration as is, or is likely to be, injurious  
27 to human health, plant or animal life, or  
28 property, or which unreasonably interfere with  
29 enjoyment of life and property. Section  
30 1.07(c). RCW 70.94.030(2).

31 Section 9.11(a) thus makes "air pollution" unlawful. Therefore,  
32 when smoke, flyash and odor are present in the outdoor atmosphere in

1 sufficient quantities and of such characteristics and duration as is,  
2 or is likely to be, injurious to human health, plant or animal life,  
3 or property, or which unreasonably interferes with enjoyment of life  
4 and property, Section 9.11(a) is violated. This language is not  
5 unlike the common law nuisance standard requiring substantial  
6 interference of a protected interest. Cudahy Co. v. PSAPCA, PCHB No.  
7 77-98 (1977).

8 In the instant case, respondent proved that appellant caused a  
9 fire emitting smoke, flyash, odor or a combination thereof which  
10 unreasonably interfered with the complainants' enjoyment of life and  
11 property on August 20, September 10 and September 13, 1979. We  
12 conclude that appellant therefore violated respondent's Section  
13 9.11(a) of Regulation I on each of those three dates.

### 14 III

15 A verification that area population density will allow  
16 landclearing burning under respondent's Section 8.06 of Regulation I  
17 does not license the invasion of interests protected by Sections 9.04  
18 and 9.11(a). These interests were present in the form of the occupied  
19 residences close by the fire in question. Appellant was on notice to  
20 protect these interests during the course of the land clearing fire  
21 and did not. Because the events of August 20, 1979, were the first  
22 documented occasion on which a violation was brought to appellant's  
23 attention, the penalty pertaining thereto should be mitigated. The  
24 following two penalties should not be mitigated.

### 25 IV

26 Any Finding of Fact which should be deemed a Conclusion of Law is  
27



1 hereby adopted as such.


2 From these Conclusions the Board enters this

3 ORDER

4 The \$250 civil penalty of August 20, 1979, (No. 4420) is hereby  
5 abated to \$125, and as such is affirmed. The two \$250 civil penalties  
6 of September 10 and 13, 1979, (Nos. 4452 and 4454) are each hereby  
7 affirmed.

8 DONE at Lacey, Washington this 22<sup>nd</sup> day of April, 1980

9 Pollution Control Hearings Board

10   
11 WILLIAM A. HARRISON  
12 Presiding Officer  
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